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IN THE

Supreme Court of the United States

October Term, 1964

No. 801

EDWARD WARD, CHARLES CAGE, WILLIAM CHEVALIER, and EARL DAVIS,

Petitioners,

—v.—

LOUISIANA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

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LOUISIANA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

Petitioners pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Louisiana, entered in the above-entitled case on July 1, 1964, rehearing of which was denied October 7, 1964.

Citation to Opinion Below

The opinion of the Supreme Court of Louisiana is reported at 167 So. 2d 359.

Jurisdiction

The judgment of the Supreme Court of Louisiana affirming petitioners' convictions and sentences was entered on July 1, 1964, and rehearing was denied October 7, 1964.[1]

[1] In the certified record the notation "Rehearing refused October 7, 1964," appears stamped on p. 6 of the opinion below and also on the last page of the application for rehearing which is attached to the opinion below in the certified record.

The jurisdiction of this Court is invoked pursuant to 28 U. S. C. §1257(3), petitioners having asserted below, and asserting here, the deprivation of rights, privileges, and immunities secured to them by the Constitution of the United States.

Questions Presented

1. Whether the rights of petitioners Ward, Cage, Chevalier and Davis under the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States were violated at their trial for the crime of murder in a Louisiana court where the prosecutor excluded all Negroes from jury service by using peremptory challenges on the basis of race?

2. Whether the rights of petitioners Cage, Chevalier and Davis under the due process clause of the Fourteenth Amendment to the United States Constitution were violated in that they were convicted of murder on a record containing no evidence of their guilt and no evidence that they participated in, had prior knowledge of, or were able to prevent any act of violence toward the alleged murder victim?

Constitutional Provisions and Statutes Involved

1. Section I of the Fourteenth Amendment to the Constitution of the United States.

2. Louisiana Statutes Annotated, Constitution, Art. 1, §10 (Constitution, Volume 1, p. 153):

> §10. *Criminal prosecutions; information as to accusation; peremptory challenges*
>
> Section 10. In all criminal prosecutions, the accused shall be informed of the nature and cause of the accusa-

tion against him; and when tried by jury shall have the right to challenge jurors peremptorily, the number of challenges to be fixed by law.

3. Louisiana Revised Statutes Annotated, R. S. 15:354 (Volume 11, p. 117):

§354. *Number of peremptory challenges allowed*

In all trials for any crime punishable with death, or necessarily with imprisonment at hard labor, each defendant shall be entitled to challenge peremptorily twelve jurors, and the prosecution twelve for each defendant. In all other criminal cases each defendant shall have six peremptory challenges and the state six for each defendant.

4. Louisiana Revised Statutes Annotated, R. S. 14:24 (Volume 9, p. 86):

§24. *Principals*

All persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime are principals.

5. Louisiana Revised Statutes Annotated, R. S. 14:30 (Volume 9, p. 352):

§30. *Murder*

Murder is the killing of a human being.

(1) When the offender has a specific intent to kill or to inflict great bodily harm; or

(2) When the offender is engaged in the perpetration or attempted perpetration of aggravated arson,

aggravated burglary, aggravated kidnapping, aggravated rape, armed robbery, or simple robbery, even though he has no intent to kill.

Whoever commits the crime of murder shall be punished by death.

Statement

Petitioners Edward Ward, Charles Cage, William Chevalier and Earl Davis were indicted on March 5, 1963, and charged with murdering one John Fisher on or about November 11, 1962 (R. 28). Petitioners were tried together before a jury in the Tenth Judicial District Court, Parish of Natchitoches, Louisiana on April 1-6, 1963. On April 6, 1963, petitioner Edward Ward was found "guilty as charged" and petitioners Cage, Chevalier and Davis were found "guilty as charged without capital punishment" (R. 24, 28). Edward Ward was sentenced to suffer the death penalty by electrocution (R. 26). William Chevalier, Earl Davis and Charles Cage were sentenced to confinement in the state penitentiary at hard labor for life (R. 26).

Petitioners appealed to the Supreme Court of Louisiana which affirmed in an opinion filed July 1, 1964. Rehearing was denied October 7, 1964. The Supreme Court of Louisiana stayed the execution of its judgment as to petitioner Ward for a period of 90 days from October 7, 1964, to enable petitioners to seek review in this Court.

The evidence adduced at the trial is summarized below.

On November 10, 1962, Northwestern College located in Natchitoches, Louisiana was having its Homecoming Celebration (R. 359). After a football game that day, a party was held at the apartment of five students from that college, one of whom was John Fisher (R. 354). The party started

in the early evening and there were numerous guests (R. 342, 354). Liquor was served and most of the male guests were drinking (R. 190, 351). James Larry Weeks came to this party at about midnight and there met Daniel J. Brupbacher (R. 129). According to the testimony of Weeks, Brupbacher was intoxicated (R. 155, 190). They decided to go to the Circle Cafe, which was located about one block from Fisher's apartment, to get some food (R. 130).

With their arms around each other, Brupbacher and Weeks walked down the street to the Circle Cafe (R. 155). Brupbacher was talking loudly and cursing (R. 156).[2] As they approached the Circle Cafe, they observed a group of Negro boys and men standing in front of the colored entrance (R. 156, 263). Weeks told Brupbacher to quiet down (R. 156). Three of the young men in front of the Cafe were petitioners Charles Cage, William Chevalier and Earl Davis. A fourth boy was W. C. Courtney (R. 802). These four young boys were emerging from the colored section of the Cafe (R. 802). Previously, they had been out driving a car borrowed from petitioner Edward Ward, for whom Chevalier, Cage and Davis worked (R. 736, 871).

Weeks testified that as he and Brupbacher approached the young Negro boys, he bumped into Chevalier (R. 158, 263, 740). Edward Ward testified that Chevalier was under the impression that it had been done intentionally (R. 872). Heated words were exchanged between Weeks and Brupbacher and some of the young Negro boys (R. 740, 802). Weeks and Brupbacher began backing toward the door of the Circle Cafe (R. 159, 263). At that time, a group of white men emerged from the Circle Cafe and came to the rescue of Weeks and Brupbacher (R. 171).

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[2] Testimony of Weeks.

Charles Cage, Earl Davis, William Chevalier and W. C. Courtney began to run (R. 168). Courtney was separated from petitioners Chevalier, Cage and Davis who fled toward the car of petitioner Ward (R. 168). Courtney picked up a stone lying in the street and, as he fled, hurled it at Brupbacher and Weeks (R. 159, 162). The stone missed both of them; ricocheted from the door of the Circle Cafe; and fell onto the sidewalk (R. 162). Weeks, emboldened by the presence of the newly arrived whites, went in pursuit of petitioners, who had fled to their car (R. 162, 169, 172). Weeks stated that as they drove past, he picked up the rock which Courtney had thrown and hurled it through the windshield of the car in which the three petitioners were attempting to escape (R. 132, 169). Petitioner Chevalier, who was driving, was cut on the side of the head (R. 804).

W. C. Courtney ran into the colored section of the Circle Cafe (R. 166). Weeks, who testified that he was by this time enraged, went with his friends in pursuit of Courtney (R. 162, 167, 233). He was stopped at the entrance of the Circle Cafe by the waitress (R. 226). The police were called and arrived shortly afterwards. Weeks described what had occurred to the officers (R. 388). They arrested Courtney and took him to the police station "pending" the swearing out of a warrant by Weeks (R. 389).

Weeks and Brupbacher ate at the Cafe and eventually returned to the party around 1:00 p.m. on the morning of November 11, 1962.

Meanwhile, petitioners Chevalier, Cage and Davis were looking for Ward. Cage testified that they were concerned about the damage to Ward's car, a 1956 Buick, and had decided that they would pay for the damage to it (R. 818). Eventually, they located Edward Ward at the Casa Grande Club, some distance from the scene of the incident (R. 819).

Cage and Davis were too young to enter the Club, so William Chevalier went in alone (R. 744, 820).

Ward stated that Chevalier approached him in the Casa Grande Club and told him of the damage and of the boys' intention to pay for it (R. 872). Noticing the cut on Chevalier's head, Ward began to question him more closely as to what had happened. Chevalier explained and the two went outside to where Cage and Davis were waiting and there talked further of the incident (R. 873). Ward testified that he was angered by what had been done to the boys and to his car (R. 875). He testified also that he told the boys to get into the second of his cars, a white 1960 Ford Station Wagon, and to wait there for him (R. 805, 873). He stated at trial that it was his intention to go and see about the damage (R. 875). The boys started toward the Ford Station Wagon (R. 805). Ward returned alone to the Casa Grande Club to take leave of his friends there and explain his mission (R. 805, 873).[3] Ward testified that he was counseled by various people in the Club of the danger of approaching an unruly crowd of white men without any protection (R. 873, 875). He stated at trial that because of their advice he procured a gun from the owner of the club (R. 874). Ward testified that he then approached the car in which the boys were waiting and, as he did so, held the gun close to himself, concealing it from their vision (R. 874-5). He testified also that on getting into the car, he slipped the gun under the driver's seat out of the sight of petitioners Chevalier, Cage and Davis (R. 874). Ward did not intend that the boys see the gun, and, they did not, in fact, see it (R. 746, 808).[4]

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[3] Testimony of Charles Cage and Edward Ward.

[4] Testimony of Charles Cage and Earl Davis

Ward began to drive toward the scene of the incident in which the car was damaged (R. 806-7, 876-7).

Shortly after Weeks and Brupbacher returned to the party, a violent scene erupted. Donald Bates, one of the guests at the party, began to quarrel with and make unseemly remarks to and about his date, Gloria Millington (R. 138-9, 177-8). John Fisher told Bates that he would not tolerate such conduct in his house and asked him to leave. This Bates refused to do. A struggle resulted when Fisher attempted to force Bates from his apartment (R. 138-9, 176). The struggle resulted in Fisher's bodily carrying Bates from the apartment (R. 139). Many of the men at the party accompanied the struggling pair as they went from the apartment into the street (R. 140, 268). One of this group was Brupbacher (R. 140, 268).

At that moment, Ward and the boys were approaching the corner on which the crowd from the party was standing (R. 877). Ward was heading for the Circle Cafe (R. 877). Ward testified that on sighting the group of white men, he asked the boys whether these were the men who had damaged the car (R. 877-8). See also R. 808. They replied that they thought it was some of the men (R. 808, 878).[5] Ward pulled his car abreast of the group. Ward, Cage and Davis all testified that someone from the group ran towards the car in a threatening manner (R. 749, 808, 841, 878). Ward testified that the man challenged him with the statement, "You black son-of-a-bitch. Do you want to fight?" (R. 878). Ward, Cage and Davis testified that Ward responded, "Yes, I'll fight, goddammit," and reached under the seat, grabbed the gun and fired two shots at the approaching man (R. 749-50, 808, 879; see also R. 335). Ward, Cage and Davis testified that they did not recognize

[5] Testimony of Charles Cage and Edward Ward.

who the approaching man was and that they were not aware of the consequences of the firing (R. 755, 809, 879). They drove off (R. 843).

John Fisher, who was standing in the crowd on the street, was killed by one of the shots. Subsequently Ward and the three boys were arrested and indicted for the murder of John Fisher. The three boys were indicted for murder as principals on the theory that they aided and abetted Edward Ward in the killing (R. 100, 105).

After trial petitioners filed a motion for new trial setting forth as one ground that:

> . . . all of those members of your defendants' race who were interrogated as prospective jurors, who did not disqualify themselves, were pre-emptorily challenged by the District Attorney and consequently no member of their race was on the jury that convicted them (R. 963).

The court overruled the motion (R. 25). The objection was reiterated in a bill of exceptions before the trial court (R. 1072-73). Apparently the district attorney did not contest the factual assertion by petitioners, and the trial judge, assuming the truth of the allegation, ruled in a *per curiam* that:

> The State, in excusing negroes from service on the jury was exercising and utilizing pre-emptory challenges, which it had a right to do (R. 1075).

On appeal the Supreme Court of Louisiana held that no rights of petitioners under the Fourteenth Amendment to the Constitution of the United States had been violated, stating:

The defendants contend that the district attorney's peremptorily challenging of members of the Negro race denied to them their constitutional rights because it constituted a systematic exclusion of Negroes from the petit jury which tried them. Defendants offered no proof whatever of these allegations, and for all intents and purposes this should end the matter. But their allegations, even if accepted as true, would not show a violation of their constitutional rights so as to entitle them to a new trial.

The right of peremptory challenge is guaranteed to an accused by the Constitution of this state, Art. 1, Sec. 10, and the number of peremptory challenges to the State and to the defendant is fixed by statute, La. Code Crim. Proc. Art. 354. The right of peremptory challenge is a right not to select, but to reject, and this right of rejection may be exercised without assignment of any cause or reason or inquiry into the motive. It was said many years ago by this court that neither the State nor the defendant has any right to complain of peremptory challenges tendered by the other. See State v. Durr, 39 La. Ann. 751, 2 So. 546 (p. 6a, Appendix).

The court below also relied on *United States ex rel. Dukes* v. *Sain*, 297 F. 2d 799 (7th Cir. 1962), stating that the defendant in that case "complained there, as do the defendants in this case, that the state's attorney had used his peremptory challenges to exclude all Negroes from the jury which tried him, thereby denying him due process and equal protection of the laws" (p. 7a, Appendix).

The claim that there was no evidence to support the conviction of petitioners Cage, Chevalier and Davis was made in the motion for new trial, asserting (R. 964):

That the verdict is contrary to the law and evidence:

* * * * *

b. As to your defendants, Charles Cage, William Chevalier, and Earl Davis, in that the testimony shows that neither of them fired the pistol, that they did not know that Edward Ward even had a pistol or gun of any kind, and that there was no conspiracy to kill existing between them.

The objection was reiterated in a bill of exceptions presented to the trial court (R. 1073). The trial court's *per curiam* apparently did not discuss this contention as its remarks seemingly refer only to petitioner Edward Ward.[6]

On appeal, petitioners argued the same point (see Brief of Appellants in Supreme Court of Louisiana, pp. 7, 17).[7] The Supreme Court's opinion, however, made no mention of this argument.

Thus while petitioners Cage, Chevalier and Davis plainly claimed that they were convicted on a record containing no evidence of their guilt, the no evidence claim was not specifically related by their motion to the due process

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[6] The court apparently referring only to Ward, said:

"This court, after hearing the testimony and the evidence, finds that testimony worthy of belief does not substantiate the defendant's version of what transpired, and this court is of the opinion that the verdict of the jury is completely justified by the evidence adduced at the trial and is in accordance with the law of this State" (R. 1075-76).

[7] The brief in the court below argued at p. 17 that:

"We further urge the Court that the verdict in this case is contrary to the law and evidence. The record will show such facts as to conclusively prove that Edward Ward was provoked to the extent as to remove the killing by him of John Fisher from the category of murder to that of manslaughter, and *it will also show beyond any reasonable doubt that the other three defendants, who are fuzzy-faced boys, were guilty of no crime in connection with the killing.*" (Emphasis supplied.)

clause of the Fourteenth Amendment. But it is submitted that where a no evidence claim—inherently a matter of due process—is plainly presented, it should not matter that the pleading filed makes no specific reference to the due process clause. Indeed, the form of the motion for new trial in this case, which alleged that the verdict was contrary to the law and evidence and then made the no evidence claim by reference to the facts, is very similar to the motion for new trial filed in *Garner* v. *Louisiana*, 368 U. S. 157 (*Garner* record, pp. 39-40). The motion in the *Garner* case did, in a separate paragraph, mention the Fourteenth Amendment and generally assert a denial of due process. But in the *Garner* motion there was no articulated connection between the no evidence claim in one paragraph and the general reliance on the due process clause in another. And, of course, as this Court noted in *Garner*, a claim that there is no evidence to support a conviction presents an issue of law reviewable by the Supreme Court of Louisiana (368 U. S. at 161, n. 6).

REASONS FOR GRANTING THE WRIT

I.

This Petition Presents Issues Similar to Those Pending Before This Court in Another Case in Which Certiorari Has Been Granted.

This petition presents the issue of the propriety, under the equal protection clause of the Fourteenth Amendment, of a state prosecutor's use of peremptory challenges to exclude Negroes, because of race or color, from service on a jury trying a criminal case involving Negro defendants. The Supreme Court of Louisiana held that even if it was shown that the peremptory challenge was being used systematically to exclude Negroes from serving on juries, this "would not [be] a violation of [defendants'] constitutional rights so as to entitle them to a new trial" (p. 5a, Appendix).

In the case of *Robert Swain* v. *Alabama,* No. 64, October Term, 1964, argued December 8, 1964 (33 U. S. L. Week 3216), one of the questions before this Court is whether a state may use peremptory challenges systematically to exclude Negroes from jury service. The *Swain* case has not yet been decided.

Since one of the questions presented in this petition is similar or identical to a question raised in another petition which has been granted and is pending before this Court, the issue is assumedly of such importance that it would merit the granting of this petition by this Court. Compare *Trustees of Monroe Ave. Church of Christ* v. *Perkins,* 334 U. S. 813, with *Shelley* v. *Kraemer,* 334 U. S. 1.

II.

The Public Prosecutor's Racial Use of Peremptory Challenges to Exclude Negroes From Jury Service Violated Petitioners' Rights to Due Process and Equal Protection of the Laws.

This Court has held in an unbroken line of cases since *Strauder* v. *West Virginia,* 100 U. S. 303, that the systematic exclusion of Negroes from jury service violated the Fourteenth Amendment rights of defendants in criminal cases. The rule is not qualified by the form or the perpetrator of the exclusion (*Eubanks* v. *Louisiana,* 356 U. S. 584, 587), and the Constitution is violated "by *any action of a state,* whether through its legislature, through its courts, or through its executive or administrative officers" which results in the exclusion of Negroes "*from serving*" on juries. *Carter* v. *Texas,* 177 U. S. 442, 447 (emphasis supplied); *Norris* v. *Alabama,* 294 U. S. 587, 589.

This case presents the question whether, in practice, the settled rules against jury discrimination can be totally avoided by the states through the public prosecutor's use of peremptory challenges on a racial basis. The resolution of this question will effectively determine whether the right declared in *Strauder,* and ever since, will be anything more than a theoretical right in areas which resist the doctrine. It is quite plain that in most communities, given a sufficiently large number of peremptory challenges by the legislature[8] and an absolute discretion to use them on a racial basis, a public prosecutor can indeed prevent Negroes from serving on criminal juries.[9]

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[8] See LSA-R.S. 15:354 (Vol. 11, p. 117), *supra,* p. 3.

[9] The United States Civil Rights Commission noted the problem:

> "[A]s the more obvious practices of excluding racial groups from juries have been outlawed, they have gradually been

The court below viewed the peremptory challenge as granting such an absolute discretion to the prosecutor (as well as to the defendant), and viewed the law as "precluding inquiry into the motives or mental attitudes of the one to whom the right is given" (p. 6a, Appendix). Petitioners submit that this absolutist view of the law as to peremptory challenges too greatly restricts the impact of the Fourteenth Amendment upon public officials. The Amendment places limitations on the conduct of state officers even in areas where they normally exercise wide discretion and power. For example, this Court said in *Gomillion* v. *Lightfoot*, 364 U. S. 339, 344-345, that, "Legislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution." "When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right." (*Id.* at 364 U. S. 347.)

Petitioners submit that, if the rule against jury discrimination is to be meaningful, the principle that peremptory challenges (as used by state officers) may be exercised for

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supplanted by more subtle means. One of these more sophisticated methods already mentioned is the summoning of Negroes for jury service without placing them on the panels; the Negroes are summoned but never sit. Another method used to keep Negroes off a petit jury is agreement between counsel. The staff learned from a number of white attorneys and a Federal judge in Alabama in March 1961, that the prosecution (sometimes even the local United States Attorney) and defense counsel frequently agree to challenge any Negroes who appear on petit jury panels. And one State judge in the Birmingham area was reported to ask counsel as a matter of custom at the beginning of criminal proceedings: 'Gentlemen, I presume you wish to exclude any Negroes from the jury.'" (Vol. 5, 1961 U. S. Commission on Civil Rights Report, p. 99.)

any reason must be subjected to the qualification that they cannot be used on a racial basis to exclude Negroes *qua* Negroes from jury service. As Mr. Justice Frankfurter wrote in *Gomillion* v. *Lightfoot, supra:*

> Particularly in dealing with claims under broad provisions of the Constitution, which derive content by an interpretive process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts.

The grant of peremptory challenges to the State is subject to restriction "by the necessity of having an impartial jury" and the "constitutional right of the accused" under the Fourteenth Amendment. *Hayes* v. *Missouri,* 120 U. S. 580. The State cannot grant any of its agents (the prosecutor included) power to use juries unrepresentative of the community so as to distort "basic concepts of a democratic society and a representative government." *Smith* v. *Texas,* 311 U. S. 128, 130.

That the type of discrimination practiced here is sophisticated and not easy to detect is all the more reason that it should be condemned unequivocally. As Judge Edgerton wrote in a dissenting opinion in *Hall* v. *United States,* 168 F. 2d 161, 166 (D. C. Cir. 1948), cert. den. 334 U. S. 853, "The rule against excluding Negroes from the panel has no value if all who get on the panel may be systematically kept off the jury."

Although the Supreme Court of Louisiana found that petitioners had not offered proof that Negroes were systematically excluded by use of the State's peremptory challenges, the Court chose to disregard this conclusion, exercised its discretion and decided petitioners' constitutional

claim as if the allegations with respect to use of peremptory challenges were true.[10] In denying petitioners' claim on the merits, the Supreme Court of Louisiana broadly approved unrestricted use of peremptory challenges even if the State thereby systematically excludes Negroes from jury service. Such delineation of the constitutional obligations of prosecuting attorneys, in a state where persistent exclusion of Negroes from jury service is a flagrant violation of the Constitution and decisions of this Court, clearly presents a question of gravity for consideration of this Court on writ of certiorari.

III.

Petitioners Cage, Chevalier and Davis Were Convicted of Murder on a Record Containing No Evidence of Their Guilt in Violation of the Due Process Clause of the Fourteenth Amendment.

Petitioners Cage, Chevalier and Davis were tried, convicted and sentenced to life imprisonment under an indictment charging that they did:

> . . . on or about the 11th day of November in the year of Our Lord One Thousand Nine Hundred and Sixty-Two, . . . unlawfully murder John Fisher, contrary to the form of the Statute of the State of Louisiana . . . (R. 93-94).

They were prosecuted on the theory that they aided and abetted Edward Ward in the slaying, it never having

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[10] Petitioners' constitutional claim is, therefore, squarely presented to this Court for review, *Coleman* v. *Alabama*, 377 U. S. 129, 133.

been asserted that either of these three petitioners shot or in any way harmed the victim.[11] The indictment charging petitioners as principals is authorized by LSA-R.S. 14:24, quoted *supra* at p. 3.[12]

Under the Louisiana decision, "aiding and abetting" means the active and knowing participation of a defendant in the criminal act of another person. *State* v. *Poynier,* 36 La. Ann. 572 (1884); *State* v. *Rodesta,* 173 La. 623, 138 So. 124 (1931); *State* v. *Sims,* 197 La. 347, 1 So.2d 541 (1941); *State* v. *Capaci,* 179 La. 462, 154 So. 419 (1934).

The record in this case contains no evidence of any active and knowing participation by Chevalier, Cage and Davis in the killing of John Fisher. Indeed, all of the evidence is to the contrary. Briefly characterized, the evidence merely established that Cage, Chevalier and Davis were present in an automobile driven by Ward when the latter shot John Fisher. But there was no evidence that any of the three alleged aiders and abetters knew of or had any reason to know either that Ward had a weapon or that he would use it. Neither is there any evidence that either of these three young boys encouraged Ward to shoot Fisher or actually participated in the shooting.

All of the evidence about the involvement of Cage, Chevalier and Davis will be summarized below. They are young

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[11] That the prosecution case rested on an aiding and abetting theory is clear from the district attorney's opening and closing statements (R. 106-8; 923).

[12] In 1932 Louisiana "sought to simplify its criminal law and procedure by abolishing the common law distinction between principals and accessories before the fact." (LSA-R.S. 14:24, Reporter's Comment.) However, this change has no real bearing on petitioners' cases, for their presence at the scene of the slaying was admitted. Even at common law persons who were present at the commission of a felony and who aided, assisted or encouraged the commission of felony were considered principals.

boys.[13] On the night of November 10, 1962, they had borrowed and were using the car of petitioner Edward Ward who was Charles Cage's uncle (R. 736, 831). They became involved in a slight incident with several white men which resulted in the breaking of the windshield of their borrowed car (R. 132, 162, 169). Worried about the damage to the car, they sought Edward Ward with the intention of paying and did in fact offer to pay Edward Ward for the damage (R. 818, 872). Ward ordered them into another car which he owned and they obeyed and went to the car (R. 805, 873); Ward then entered a nearby cafe and was there counseled to and did procure a gun (R. 873-75); Ward concealed the gun from the sight and knowledge of petitioners Cage, Chevalier and Davis.[14] None of these

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[13] At trial Davis was 19 (R. 733), Cage was 18 (R. 799) and Chevalier was described as a "youngster" (R. 870).

[14] Testimony of petitioner Edward Ward on direct examination (R. 874-75):

"I got into the car—in the meantime I had the revolver in my right hand, at my side, and I opened the door of the stationwagon and got in and I just put it under the seat.

* * * * *

"Q. Now, did you show any of these boys that gun? A. No, Sir. There may have been a possibility of Bill [William Chevalier] seeing the gun.

Q. Insofar as you know, did any of them see the gun? A. I couldn't truthfully say.

Q. Yes, or no, you don't know whether they did or not? A. I'm almost positive—it would have almost been impossible, not only impossible for the boys in the back seat [Cage and Davis] to see me get in with something and slide down like I did.

Q. Did you—were you showing the gun around then? A. No, Sir."

On cross-examination petitioner Ward testified (R. 885-86):

"A. No, Sir, I got in the car—do you want me to give you a demonstration?

Q. Yes. A. I approached the vehicle in this manner. This is the driver's seat; this is my car right here; this is the door; I hugged the gun to my body like this. The door on a Ford is a pushbutton. You push the button to open the door. I

petitioners knew that Ward had a gun or any instrument of violence.[15] Petitioners knew only that Ward was going

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slid right in and shoved the gun under the seat just like—all in one motion of getting into the automobile.

Q. Now, was that between your legs then that you—under the seat—or was it to the left side? A. It couldn't be specifically to my—it couldn't be to my left if I was going into the car from the right, but whether I put it between my legs—I would say it would be to the right of my right leg.

Q. To the right of your right leg. Well, that, then would have placed the gun between you and Chevalier would it not? A. Yes, it would, to a certain extent. But there is a transmission housing that's located in the vehicle. It doesn't make that Chevalier would have to see me have the gun in there. Knowing that I had put it in there, I don't know that he could state that I positively put a gun in there, or what."

[15] On direct examination, petitioner Cage testified (R. 807-09):

"A. Well, when we got to the intersection of Lafayette and Second Streets, these boys were standing on the corner.

Q. White or colored? A. They was white.

Q. All right, go ahead. A. At that time my uncle asked if that was the boy involved in the rock-throwing incident, and we said we believe it was, . . . And the boys looked around, and one of them started saying something and started walking towards the car. I can't recall what he said, because the window was rolled up in the back, and I couldn't understand what he had—what he was saying, and at that time, I heard my uncle say, 'Yes, I'll fight you.' And . . .

Q. Go ahead. A. And then, that's when I seen the gun. He had picked the gun up.

Q. Now, when you say, 'He had picked the gun up,' who do you mean picked the gun up? A. My uncle, Edward Ward.

Q. Had you seen the gun before? A. No, Sir.

Q. Did you know your uncle had the gun until then? A. No, Sir.

Q. Were you living with your uncle and your aunt on Fifth Street? A. Yes, Sir. I was.

Q. Had you ever seen a gun in his home? A. No, Sir.

Q. Had you ever seen a gun in his car? A. No, Sir.

Q. Had you ever seen him with a gun any time any place until you saw him pull the gun then? A. No, Sir.

Q. That's the first time you knew he had the gun? A. Yes, Sir."

Petitioner Davis testified on cross-examination (R. 749-50):

"A. He turned into Lafayette Street and stopped and asked us was that some of the boys. We said, 'Yes, we think that's

"to see about" the damage that had been done to his car (R. 760, 873). None of petitioners Cage, Chevalier or Davis had ever known Ward to carry or own a gun (R. 808, 746). None of petitioners knew what Ward intended to do on encountering the young men who had damaged his car;[16] on approaching the scene of the earlier incident, they observed a group of white men standing in the street (R. 808, 877-78); Ward asked petitioners Cage, Chevalier and Davis whether these were some of the men who had damaged his car and some or all of petitioners replied that they thought

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some of them.' And one of the boys started towards the car and said something to Mr. Ward. And I heard Mr. Ward say, 'I'll fight you all,' and I saw a gun in Ward's hand.

Q. Where did this gun come from? A. I don't know, because I didn't know he had it until it was in the window and fired.

Q. You hadn't seen that gun earlier in the evening? A. No, Sir.

Q. What did this boy say? A. I didn't understand what he said, because the back window was wound up in the car. I was sitting on the right-hand side. But I did hear him saying something."

On direct examination petitioner Davis testified (R. 746):

"Q. And you had no gun? A. No, Sir.

Q. And you didn't see any gun? A. I didn't see any gun.

Q. During the time you had worked for Ward at his store, which you said was September until through November 10th, had you ever seen him with a gun? A. No, Sir.

Q. Had you ever seen either of the other boys, either Cage or Chevalier with a gun? A. No, Sir.

Q. Had you ever packed a gun? A. No, Sir."

[16] On cross-examination, petitioner Davis testified (R. 829):

"Q. Now, what did you all talk about—what did you all talk about out front then besides the breaking of the windshield and Ward's asking Chevalier how his head was, what else did you talk about when Ward was there? A. That's all.

Q. You didn't talk about anything else? A. No, Sir.

* * * * *

"Q. Now, when he got in—since you didn't talk about anything else, then, when you got in the stationwagon, did Ward

it was (*Ibid.*). On stopping in front of the group, one of the men in the group ran toward the car stating to Ward, "You black bastard, do you want to fight?" (R. 878). Ward then pulled the gun from its place of concealment and

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tell you where you were going? A. No, Sir, he didn't. I didn't have any. . . .

Q. Did you have any idea where you were going? A. Well, I figured we was probably going to the police station or maybe to the hospital.

* * * * *

"Q. Was there any conversation as you went out Dixie Street to Texas Street?

* * * * *

"A. If there was any conversation, it was about the place up on Bill's head—Chevalier's head" (R. 831).

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"A. I remember a conversation about Chevalier's head.

Q. Chevalier's head? A. And a conversation him asking where it had happened.

Q. Will you repeat that? A. And then he asked us where did this incident happen.

Q. And where were you at that point? A. We was on Church Street if I remember right—Church Street or the corner that comes in Church Street or somewhere in the middle of the block" (R. 832).

Petitioner Earl Davis testified on direct examination (R. 746):

"Q. Now, from the time you left the inn and while you were driving towards downtown Natchitoches, where did you think you were going? A. I figured we was going to the police station or somewhere or the hospital because Chevalier was still bleeding, and Mr. Ward had seen that his head was still bleeding, so he thought it was pretty bad, so he asked Chevalier about his head, was his head doing all right."

Petitioner Davis further testified on direct examination:

"A. Well, I'm not familiar with the streets. All I know is that we came back out on Texas Street—we made a left-hand turn on Texas Street, until we got to Fifth Street, and then a right-hand turn and went straight up until we got to some street—Church Street.

Q. All right. A. And made a left-hand turn on Church Street. Then Bill's [William Chevalier's] head was still bleeding a little then and my uncle, Edward Ward, asked him how was his head, and he told him that his head was doing a little

replying, "Yes, I'll fight, goddammit," fired at the man who approached his car (R. 449-50, 808, 879). John Fisher standing on the street at the scene was killed (R. 330). Petitioners Cage, Chevalier and Davis had no opportunity to prevent Ward from firing as he did (R. 748-51, 807-09).

Thus none of the essential elements of aiding and abetting under Louisiana law were established. There was no evidence to establish their guilt of any crime in connection with Fisher's death, and no evidence inconsistent with their innocence.

The trial judge never defined aiding and abetting for the jury in his charge. He merely read LSA-R.S. 14:24 to the jury (R. 956), without explaining any of the terms used.[17] The trial judge's *per curiam* overruling the no evidence objection did not discuss the evidence as to these three petitioners in even a general or conclusory manner. And despite a host of decisions declaring that a no evidence claim is one which the Louisiana Supreme Court "must decide" (*State* v. *Nomey*, 204 La. 667, 16 So.2d 226, 227 (1943), and cases collected; *State* v. *Wooderson*, 213 La. 40, 34 So.2d 360 (1948); *State* v. *Sbisa*, 233 La. 961, 95 So.2d 619, 62[illegible] (1957)), that court affirmed without com-

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better. I mean, that it was doing all right. And so then he asked him, say, 'Where was the place that this happened at?'

Q. Now, just a moment. Where were you when your uncle asked you that? A. We were on—we were either making the turn on Church Street or in the middle of the block. I'm not sure where it was, but. . . .

Q. Had your uncle asked you that at any time previously? A. No, Sir.

Q. Was that the first time he asked that? A. Yes, Sir" (R. 806-07).

[17] The potential confusion of a layman hearing a reading of LSA-R.S. 14:24 is enormous. One might even be misled to believe that merely being "concerned in the commission of a crime" without more is enough to convict.

ment upon petitioners' arguments that there was no evidence to support the conviction.

This is a plain case for application of the rule of *Thompson* v. *Louisville*, 362 U. S. 199, that a conviction without evidence denies due process as protected by the Fourteenth Amendment.[18]

Following *Thompson*, this Court has applied the same rule in *Garner* v. *Louisiana*, 368 U. S. 157; *Taylor* v. *Louisiana*, 376 U. S. 154; and *Barr* v. *Columbia*, 378 U. S. 146, all cases involving misdemeanor convictions.[19] This rare and unusual case presents the no evidence issue in the context of a capital felony and three sentences of life imprisonment. It is submitted that the severity of the punishments involved and the unusual clarity of petitioners' innocence in the record militates in favor of this Court's exercising its certiorari jurisdiction in this case.

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[18] In *Thompson* there was no provision for an appeal of the conviction in the state courts. Here the state trial and appellate courts simply never discussed the issue in their opinions.

[19] These "no evidence" decisions are somewhat akin to several decisions based on the "due process vagueness" ground such as *Wright* v. *Georgia*, 373 U. S. 284, and *Bouie* v. *Columbia*, 378 U. S. 347. The *Bouie* decision might have been directly applicable to the instant case if the Louisiana Supreme Court had discussed the merits of the no evidence argument and attempted to expansively construe its law on aiding and abetting felonies to cover the facts of this case.

CONCLUSION

WHEREFORE, for the foregoing reasons it is respectfully submitted that the petition for certiorari should be granted.

Respectfully submitted,

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